

views and arguments presented is generally required.<sup>153</sup> Other requirements pertaining to oral and written presentations are set forth in section 1.1206(b) of the Commission's rules.

## B. Comment Filing Procedures

54. Pursuant to sections 1.415 and 1.419 of the Commission's rules, 47 C.F.R §§ 1.415, 1.419, interested parties may file comments and reply comments on or before the dates indicated on the first page of this document. **All filings related to this Order and the Notice of Proposed Rulemaking should refer to ET Docket No. 04-295.** Comments may be filed using: (1) the Commission's Electronic Comment Filing System (ECFS), (2) the Federal Government's eRulemaking Portal, or (3) by filing paper copies. See Electronic Filing of Documents in Rulemaking Proceedings, 63 FR 24121 (1998).

- **Electronic Filers:** Comments may be filed electronically using the Internet by accessing the ECFS: <http://www.fcc.gov/cgb/ecfs/> or the Federal eRulemaking Portal: <http://www.regulations.gov>. Filers should follow the instructions provided on the website for submitting comments.
  - For ECFS filers, if multiple docket or rulemaking numbers appear in the caption of this proceeding, filers must transmit one electronic copy of the comments for each docket or rulemaking number referenced in the caption. In completing the transmittal screen, filers should include their full name, U.S. Postal Service mailing address, and the applicable docket or rulemaking number. Parties may also submit an electronic comment by Internet e-mail. To get filing instructions, filers should send an e-mail to [ecfs@fcc.gov](mailto:ecfs@fcc.gov), and include the following words in the body of the message, "get form." A sample form and directions will be sent in response.
- **Paper Filers:** Parties who choose to file by paper must file an original and four copies of each filing. If more than one docket or rulemaking number appears in the caption of this proceeding, filers must submit two additional copies for each additional docket or rulemaking number.

Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail (although we continue to experience delays in receiving U.S. Postal Service mail). All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission.

- The Commission's contractor will receive hand-delivered or messenger-delivered paper filings for the Commission's Secretary at 236 Massachusetts Avenue, NE., Suite 110, Washington, DC 20002. The filing hours at this location are 8:00 a.m. to 7:00 p.m. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes must be disposed of before entering the building.
- Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743.

<sup>153</sup> See 47 C.F.R. § 1.1206(b)(2).

- U.S. Postal Service first-class, Express, and Priority mail should be addressed to 445 12<sup>th</sup> Street, SW, Washington DC 20554.

55. All filings must be addressed to the Commission's Secretary, Marlene H. Dortch, Office of the Secretary, Federal Communications Commission, 445 12th Street, SW, Washington, DC 20554. Parties should also send a copy of their filings to Janice Myles, Competition Policy Division, Wireline Competition Bureau, Federal Communications Commission, Room 5-C140, 445 12th Street, SW, Washington, D.C. 20554, or by e-mail to [janice.myles@fcc.gov](mailto:janice.myles@fcc.gov). Parties shall also serve one copy with the Commission's copy contractor, Best Copy and Printing, Inc. (BCPI), Portals II, 445 12th Street, SW, Room CY-B402, Washington, D.C. 20554, (202) 488-5300, or via e-mail to [fcc@bcpiweb.com](mailto:fcc@bcpiweb.com).

56. Documents in ET Docket No. 04-295 are available for public inspection and copying during business hours at the FCC Reference Information Center, Portals II, 445 12th St. SW, Room CY-A257, Washington, DC 20554. The documents may also be purchased from BCPI, telephone (202) 488-5300, facsimile (202) 488-5563, TTY (202) 488-5562, e-mail [fcc@bcpiweb.com](mailto:fcc@bcpiweb.com).

#### **C. Accessible Formats**

57. To request materials in accessible formats for people with disabilities (braille, large print, electronic files, audio format), send an e-mail to [fcc504@fcc.gov](mailto:fcc504@fcc.gov) or call the Consumer & Governmental Affairs Bureau at (202) 418-0530 (voice) or (202) 418-0432 (TTY). Contact the FCC to request reasonable accommodations for filing comments (accessible format documents, sign language interpreters, CART, etc.) by e-mail: [FCC504@fcc.gov](mailto:FCC504@fcc.gov) or phone: 202-418-0530 or TTY: 202-418-0432.

#### **D. Regulatory Flexibility Analysis**

58. As required by the Regulatory Flexibility Act, see 5 U.S.C. § 603, the Commission has prepared a Final Regulatory Flexibility Certification of the possible significant economic impact on small entities of the policies and rules addressed in this document. This certification is set forth in Appendix C.

59. As required by the Regulatory Flexibility Act, 5 U.S.C. § 603, the Commission has prepared an Initial Regulatory Flexibility Analysis (IRFA) of the possible significant economic impact on small entities of the policies and rules addressed in this document. The IRFA is set forth in Appendix C. Written public comments are requested on the IRFA. These comments must be filed in accordance with the same filing deadlines as comments filed in response to this *Further Notice* and must have a separate and distinct heading designating them as responses to the IRFA.

#### **E. Paperwork Reduction Act Analysis**

60. This document does not contain proposed information collection(s) subject to the Paperwork Reduction Act of 1995 (PRA), Public Law 104-13. In addition, therefore, it does not contain any new or modified "information collection burden for small business concerns with fewer than 25 employees," pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107-198, see 44 U.S.C. § 3506(c)(4).

**F. Congressional Review Act**

61. The Commission will send a copy of this Report and Order in a report to be sent to Congress and the Government Accountability Office pursuant to the Congressional Review Act, *see* 5 U.S.C. 801(a)(1)(A).

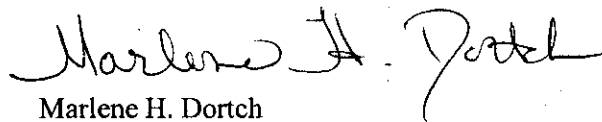
**VI. ORDERING CLAUSES**

62. Accordingly, IT IS ORDERED that pursuant to sections 1, 4(i), 7(a), 229, 301, 303, 332, and 410 of the Communications Act of 1934, as amended, and section 102 of the Communications Assistance for Law Enforcement Act, 18 U.S.C. § 1001, the Report and Order and Further Notice of Proposed Rulemaking in ET Docket No. 04-295 IS ADOPTED, and that Part 64 of the Commission's Rules, 47 C.F.R. Part 64, is amended as set forth in Appendix B. The requirements of this Order shall become effective 30 days after publication in the Federal Register.

63. IT IS FURTHER ORDERED that the Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, SHALL SEND a copy of this Report and Order, including the Final Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

64. IT IS FURTHER ORDERED that the Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, SHALL SEND a copy of this Further Notice of Proposed Rulemaking, including the Initial Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION



Marlene H. Dortch  
Secretary

**APPENDIX A  
LIST OF COMMENTERS**

**Comments in ET Docket No. 04-295**

<b><u>Comments</u></b>	<b><u>Abbreviation</u></b>
AMA TechTel Communications, LLC	AMA TechTel
American Civil Liberties Union	ACLU
BellSouth Corporation	BellSouth
Cellular Telecommunications & Internet Association	CTIA
Cingular Wireless LLC	Cingular
Coalition for Reasonable Rural Broadband CALEA Compliance	CRRBCC
Corr Wireless Communications, L.L.C	Corr
EarthLink, Inc.	EarthLink
EDUCAUSE Coalition	EDUCAUSE
Electronic Frontier Foundation	EFF
European Telecommunications Standards Institute	ETSI
Fiducianet, Inc.	Fiducianet
Global Crossing North America, Inc.	Global Crossing
GVNW Consulting, Inc.	GVNW
Industry and Public Interest Joint Commenters	I&P
Level 3 Communications, LLC	Level 3
MaineStreet Communications, Inc.	MaineStreet
Motorola, Inc.	Motorola
National Cable & Telecommunications Association	NCTA
National Telecommunications Cooperative Association	NTCA
New York Attorney General Eliot Spitzer	Spitzer
Nextel Communications, Inc.	Nextel
Nuvio Corporation	Nuvio
Organization for the Promotion and Advancement of Small Telecommunications Companies	OPASTCO
Rural Cellular Association	RCA
Rural Telecommunications Group, Inc.	RTG
Rural Telecommunications Providers	RTP
Satellite Industry Association	SIA
SBC Communications Inc.	SBC
Smithville Telephone Company	STC
Subsentio, Inc.	Subsentio
Telcom Consulting Associates, Inc.	TCA
Telecommunications Industry Association	TIA
T-Mobile USA, Inc.	T-Mobile
Texas Department of Public Safety	Texas DPS
United States Department of Justice	DOJ
United States Internet Service Provider Association	US ISPA

United States Telecom Association	USTA
VeriSign, Inc.	VeriSign
Verizon	Verizon
Vonage Holdings Corp.	Vonage
Yahoo! Inc.	Yahoo!

## Replies in ET Docket No. 04-295

<b>Replies</b>	<b>Abbreviation</b>
BellSouth Corporation	BellSouth
Cellular Telecommunications & Internet Association	CTIA
EarthLink, Inc.	EarthLink
Electronic Frontier Foundation	EFF
Fiducianet, Inc.	Fiducianet
Global Crossing North America, Inc.	Global Crossing
Industry and Public Interest Joint Commenters	I&P
Level 3 Communications, LLC	Level 3
MetroPCS Communications, Inc.	MetroPCS
National Cable & Telecommunications Association	NCTA
National Telecommunications Cooperative Association	NTCA
Nextel Communications, Inc.	Nextel
Rural Iowa Independent Telephone Association	RIITA
Satellite Industry Association	SIA
SBC Communications Inc.	SBC
Southern LINC	Southern LINC
Sprint Corporation	Sprint
Telecommunications Industry Association	TIA
T-Mobile USA, Inc.	T-Mobile
United Power Line Council	UPLC
United States Cellular Corporation	USCC
United States Department of Justice	DOJ
United States Internet Service Provider Association	US ISPA
United States Small Business Administration	SBA
United States Telecom Association	USTA
United Utilities, Inc., <i>et al.</i>	United Utilities
Verint Systems, Inc.	Verint
VeriSign, Inc.	VeriSign
Verizon	Verizon
Vonage Holdings Corp.	Vonage

**APPENDIX B  
FINAL RULES**

Part 64 of the Code of Federal Regulations is amended as follows:

**PART 64 – MISCELLANEOUS RULES RELATING TO COMMON CARRIERS**

1. The authority for part 64 remains unchanged.
2. Section 64.2102 is amended by adding paragraph (d) to read as follows:

\* \* \*

(d) *Telecommunications Carrier*. The term *Telecommunications Carrier* includes:

(1) A person or entity engaged in the transmission or switching of wire or electronic communications as a common carrier for hire;

(2) A person or entity engaged in providing commercial mobile service (as defined in section 332(d) of the Communications Act of 1934 (47 U.S.C. 332(d))); or

(3) A person or entity that the Commission has found is engaged in providing wire or electronic communication switching or transmission service such that the service is a replacement for a substantial portion of the local telephone exchange service and that it is in the public interest to deem such a person or entity to be a telecommunications carrier for purposes of CALEA.

\* \* \*

## APPENDIX C REGULATORY FLEXIBILITY ANALYSES

### I. FINAL REGULATORY FLEXIBILITY CERTIFICATION

1. As required by the Regulatory Flexibility Act of 1980, as amended (RFA),<sup>1</sup> an Initial Regulatory Flexibility Analysis (IRFA) was incorporated in the *Notice of Proposed Rulemaking (Notice)* in this proceeding.<sup>2</sup> The Commission sought written public comment on the proposals in the *Notice*, including comment on the IRFA.<sup>3</sup> This present Final Regulatory Flexibility Certification (Certification) is limited to the matters raised in the *Notice* relating to the applicability of Communications Assistance for Law Enforcement Act (CALEA) to providers of broadband Internet access services and VoIP services. The present Certification addresses comments on the IRFA concerning only those issues and conforms to the RFA.<sup>4</sup>

#### A. Need for, and Objectives of, the Rules

2. Advances in technology, most notably the introduction of digital transmission and processing techniques and the proliferation of wireless and Internet services such as broadband Internet access services and VoIP, have challenged the ability of the law enforcement agencies (LEAs) to conduct lawful surveillance. In light of these difficulties, the Department of Justice, the Federal Bureau of Investigation, and the Drug Enforcement Administration (collectively, DOJ) filed a joint petition for expedited rulemaking in March 2004. In its petition, DOJ asked the Commission immediately to declare that broadband Internet access services and VoIP services are covered by CALEA.<sup>5</sup>

3. In today's Order, we conclude that facilities-based broadband Internet access providers and providers of interconnected VoIP service are subject to CALEA as telecommunications carriers under CALEA's Substantial Replacement Provision (SRP).<sup>6</sup> Because we acknowledge that providers need a

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<sup>1</sup> See 5 U.S.C. § 603. The RFA, see 5 U.S.C. §§ 601-12, has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), Pub. L. No. 104-121, Title II, 110 Stat. 857 (1996).

<sup>2</sup> *Communications Assistance for Law Enforcement Act and Broadband Access and Services*, ET Docket No.04-295, RM-10865, Notice of Proposed Rulemaking and Declaratory Ruling, 19 FCC Rcd 15676, 15751-60, App. B (2004) (*Notice*).

<sup>3</sup> *Id.*

<sup>4</sup> See 5 U.S.C. § 604. Comments on small business issues that were raised in response to the *Notice*, rather than to the IRFA itself, are also addressed herein.

<sup>5</sup> DOJ Petition at 15.

<sup>6</sup> As explained above, the definition of "telecommunications carrier" in CALEA includes "a person or entity engaged in providing wire or electronic communication switching or transmission service to the extent that the Commission finds that such service is a replacement for a substantial portion of the local telephone exchange service and that it is in the public interest to deem such a person or entity to be a telecommunications carrier for purposes of [CALEA]." See Order, *supra*, at para. 10. Although the Commission raised a number of other issues in the *Notice*, in the Order, we address only the applicability of CALEA's SRP to providers of broadband Internet access services and VoIP services. In the coming months, we will release another order that will address separate questions regarding the assistance capabilities required of the providers covered by today's Order pursuant to section 103 of CALEA. This subsequent order will include other important issues under CALEA, such as compliance extensions and exemptions, cost recovery, identification of future services and entities subject to CALEA, and enforcement. See Order, *supra*, at para. 3.

reasonable amount of time to come into compliance with all relevant CALEA requirements, we establish a deadline of 18 months from the effective date of the Order, by which time newly covered entities and providers of newly covered services must be in full compliance. This Order is the first critical step needed to apply CALEA obligations to new technologies and services that are increasingly relied upon by the American public to meet their communications needs.<sup>7</sup>

**B. Summary of Significant Issues Raised by Public Comments in Response to the IRFA**

4. In this section, we respond to commenters who filed directly in response to the IRFA. To the extent we received comments raising general small business concerns during this proceeding, those comments are discussed throughout the Order and are also summarized in Part E, below.

5. The Office of Advocacy, U.S. Small Business Administration (SBA) and the National Telecommunications Cooperative Association (NTCA) filed comments directly in response to the IRFA.<sup>8</sup> We note that both commenters raise various concerns about issues that were raised in the *Notice* but are not addressed in today's Order. In this Certification, we address their comments only to the extent that they relate to the applicability of CALEA's SRP to broadband Internet access and VoIP service, as all other concerns will be addressed in the subsequent order.<sup>9</sup>

6. We reject SBA's argument that the Commission failed to analyze the compliance requirements and impacts on small carriers in the IRFA.<sup>10</sup> The SBA argues that this failure made it difficult for small entities to comment on possible ways to minimize any impact.<sup>11</sup> Although the Commission did not list the exact costs, in the *Notice* we identified all the potential carriers that may be required to be CALEA compliant under the SRP, described in great detail what these carriers would be required to do if they were subject to CALEA, and requested comment on how the Commission could address the needs of small businesses. Indeed, far from discouraging small entities from participating, the *Notice* elicited extensive comment on issues affecting small businesses.<sup>12</sup> Therefore, we believe that small entities received sufficient notice of the implications of CALEA compliance addressed in today's Order, and a revised IRFA is not necessary.

7. We also reject NTCA and SBA's contention that the Commission failed to include in the IRFA significant alternatives to minimize burdens on small entities.<sup>13</sup> First, NTCA argues that the Commission

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<sup>7</sup> Today's order is accompanied by a Further Notice of Proposed Rulemaking (Further Notice) that seeks comment on, among other things, the appropriateness of requiring something less than full CALEA compliance for certain classes or categories of providers, such as small or rural entities. *See* Order, *supra*, Part IV.

<sup>8</sup> NTCA Comments; NTCA Reply; SBA Reply.

<sup>9</sup> *See, e.g.*, NTCA Comments at 7 (arguing that the Commission fails to include the availability of 107(c) extensions as part of its IRFA); SBA Reply at 7-8 (stating that the IRFA did not discuss all the alternatives available to small entities, such as petitions for extensions under section 107(c) or for cost recovery under section 109(b) and allowing small carriers to rely on trusted third parties). These arguments will be addressed in the subsequent order and in the accompanying Final Regulatory Flexibility Certification addressing those particular issues.

<sup>10</sup> SBA Reply at 3-4; NTCA Comments at 4.

<sup>11</sup> SBA Reply at 3-4.

<sup>12</sup> *See, e.g.*, *Notice*, 19 FCC Rcd at 15704-05, 15715, paras. 49, 72.

<sup>13</sup> NTCA Comments at 4; SBA Reply at 7.



failed to identify in the IRFA that small entities may be exempted under the SRP's public interest clause.<sup>14</sup> In the *Notice*, however, we asked for comment as to whether there are discrete groups of entities for which the public interest may not be served by including them under the SRP.<sup>15</sup> We noted that small businesses that provide wireless broadband Internet access to rural areas may be one example of such a discrete group.<sup>16</sup> In response to the *Notice*, several small carriers filed comments claiming that the public interest would not be served by subjecting these providers to CALEA under the SRP.<sup>17</sup> Second, SBA claims the Commission failed to identify in the IRFA the option of granting an extended transition period for small carriers.<sup>18</sup> In the *Notice*, however, we specifically invited comment from all entities on the appropriate amount of time to give newly covered entities to comply with CALEA.<sup>19</sup> While we recognize that we did not specifically list in the IRFA the potential exclusion of small businesses under the SRP's public interest clause or the option of extending the time period for small carriers, the IRFA in this proceeding combined with the *Notice* appropriately identified all the ways in which the Commission could lessen the regulatory burdens on small businesses in compliance with our RFA obligations.

### C. Description and Estimate of the Number of Small Entities to Which Rules Will Apply

8. The RFA directs agencies to provide a description of and, where feasible, an estimate of the number of small entities that may be affected by the proposed rules.<sup>20</sup> The RFA generally defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction."<sup>21</sup> In addition, the term "small business" has the same meaning as the term "small business concern" under the Small Business Act.<sup>22</sup> A small business concern is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration (SBA).<sup>23</sup>

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<sup>14</sup> NTCA Comments at 4.

<sup>15</sup> *Notice*, 19 FCC Rcd at 15704-05, para. 49.

<sup>16</sup> *Id.*

<sup>17</sup> See Order, *supra*, at n.98. Although we decline to exclude any facilities-based broadband Internet access providers from CALEA at this time, we note that these telecommunications carriers have several options under CALEA. See *id.*

<sup>18</sup> SBA Reply at 7.

<sup>19</sup> See *Notice*, 19 FCC Rcd at 15742-43, paras. 140-43.

<sup>20</sup> 5 U.S.C. §§ 603(b)(3), 604(a)(3).

<sup>21</sup> 5 U.S.C. § 601(6).

<sup>22</sup> 5 U.S.C. § 601(3) (incorporating by reference the definition of "small business concern" in the Small Business Act, 15 U.S.C. § 632). Pursuant to 5 U.S.C. § 601(3), the statutory definition of a small business applies "unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such terms which are appropriate to the activities of the agency and publishes such definitions(s) in the Federal Register."

<sup>23</sup> 15 U.S.C. § 632.

## 1. Telecommunications Service Entities

### a. Wireline Carriers and Service Providers

9. We have included small incumbent local exchange carriers in this present RFA analysis. As noted above, a “small business” under the RFA is one that, *inter alia*, meets the pertinent small business size standard (e.g., a telephone communications business having 1,500 or fewer employees), and “is not dominant in its field of operation.”<sup>24</sup> The SBA’s Office of Advocacy contends that, for RFA purposes, small incumbent local exchange carriers are not dominant in their field of operation because any such dominance is not “national” in scope.<sup>25</sup> We have therefore included small incumbent local exchange carriers in this RFA analysis, although we emphasize that this RFA action has no effect on Commission analyses and determinations in other, non-RFA contexts.

10. *Incumbent Local Exchange Carriers (LECs)*. Neither the Commission nor the SBA has developed a small business size standard specifically for incumbent local exchange services. The appropriate size standard under SBA rules is for the category Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees.<sup>26</sup> According to Commission data,<sup>27</sup> 1,303 carriers have reported that they are engaged in the provision of incumbent local exchange services. Of these 1,303 carriers, an estimated 1,020 have 1,500 or fewer employees and 283 have more than 1,500 employees. Consequently, the Commission estimates that most providers of incumbent local exchange service are small businesses that may be affected by our action. In addition, limited preliminary census data for 2002 indicate that the total number of wired communications carriers increased approximately 34 percent from 1997 to 2002.<sup>28</sup>

11. *Competitive Local Exchange Carriers, Competitive Access Providers (CAPs), “Shared-Tenant Service Providers,” and “Other Local Service Providers.”* Neither the Commission nor the SBA has developed a small business size standard specifically for these service providers. The appropriate size standard under SBA rules is for the category Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees.<sup>29</sup> According to Commission data,<sup>30</sup>

<sup>24</sup> 15 U.S.C. § 632.

<sup>25</sup> Letter from Jere W. Glover, Chief Counsel for Advocacy, SBA, to William E. Kennard, Chairman, FCC (May 27, 1999). The Small Business Act contains a definition of “small-business concern,” which the RFA incorporates into its own definition of “small business.” See 15 U.S.C. § 632(a) (Small Business Act); 5 U.S.C. § 601(3) (RFA). SBA regulations interpret “small business concern” to include the concept of dominance on a national basis. See 13 C.F.R. § 121.102(b).

<sup>26</sup> 13 C.F.R. § 121.201, NAICS code 517110 (changed from 513310 in Oct. 2002).

<sup>27</sup> FCC, Wireline Competition Bureau, Industry Analysis and Technology Division, “Trends in Telephone Service” at Table 5.3, page 5-5 (June 2004) (“Trends in Telephone Service”). This source uses data that are current as of October 1, 2004.

<sup>28</sup> See U.S. Census Bureau, 2002 Economic Census, Industry Series: “Information,” Table 2, Comparative Statistics for the United States (1997 NAICS Basis): 2002 and 1997, NAICS code 513310 (issued Nov. 2004). The preliminary data indicate that the total number of “establishments” increased from 20,815 to 27,891. In this context, the number of establishments is a less helpful indicator of small business prevalence than is the number of “firms,” because the latter number takes into account the concept of common ownership or control. The more helpful 2002 census data on firms, including employment and receipts numbers, will be issued in late 2005.

<sup>29</sup> 13 C.F.R. § 121.201, NAICS code 517110 (changed from 513310 in Oct. 2002).

<sup>30</sup> “Trends in Telephone Service” at Table 5.3.

769 carriers have reported that they are engaged in the provision of either competitive access provider services or competitive local exchange carrier services. Of these 769 carriers, an estimated 676 have 1,500 or fewer employees and 93 have more than 1,500 employees. In addition, 12 carriers have reported that they are "Shared-Tenant Service Providers," and all 12 are estimated to have 1,500 or fewer employees. In addition, 39 carriers have reported that they are "Other Local Service Providers." Of the 39, an estimated 38 have 1,500 or fewer employees and one has more than 1,500 employees. Consequently, the Commission estimates that most providers of competitive local exchange service, competitive access providers, "Shared-Tenant Service Providers," and "Other Local Service Providers" are small entities that may be affected by our action. In addition, limited preliminary census data for 2002 indicate that the total number of wired communications carriers increased approximately 34 percent from 1997 to 2002.<sup>31</sup>

12. *Payphone Service Providers (PSPs)*. Neither the Commission nor the SBA has developed a small business size standard specifically for payphone services providers. The appropriate size standard under SBA rules is for the category Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees.<sup>32</sup> According to Commission data,<sup>33</sup> 654 carriers have reported that they are engaged in the provision of payphone services. Of these, an estimated 652 have 1,500 or fewer employees and two have more than 1,500 employees. Consequently, the Commission estimates that the majority of payphone service providers are small entities that may be affected by our action. In addition, limited preliminary census data for 2002 indicate that the total number of wired communications carriers increased approximately 34 percent from 1997 to 2002.<sup>34</sup>

13. *Interexchange Carriers (IXCs)*. Neither the Commission nor the SBA has developed a small business size standard specifically for providers of interexchange services. The appropriate size standard under SBA rules is for the category Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees.<sup>35</sup> According to Commission data,<sup>36</sup> 316 carriers have reported that they are engaged in the provision of interexchange service. Of these, an estimated 292 have 1,500 or fewer employees and 24 have more than 1,500 employees. Consequently, the Commission estimates that the majority of IXCs are small entities that may be affected by our action. In addition, limited preliminary census data for 2002 indicate that the total number of wired communications carriers increased approximately 34 percent from 1997 to 2002.<sup>37</sup>

14. *Operator Service Providers (OSPs)*. Neither the Commission nor the SBA has developed a small business size standard specifically for operator service providers. The appropriate size standard under SBA rules is for the category Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees.<sup>38</sup> According to Commission data,<sup>39</sup> 23 carriers have

<sup>31</sup> See *supra* note 28.

<sup>32</sup> 13 C.F.R. § 121.201, NAICS code 517110 (changed from 513310 in Oct. 2002).

<sup>33</sup> "Trends in Telephone Service" at Table 5.3.

<sup>34</sup> See *supra* note 28.

<sup>35</sup> 13 C.F.R. § 121.201, NAICS code 517110 (changed from 513310 in Oct. 2002).

<sup>36</sup> "Trends in Telephone Service" at Table 5.3.

<sup>37</sup> See *supra* note 28.

<sup>38</sup> 13 C.F.R. § 121.201, NAICS code 517110 (changed from 513310 in Oct. 2002).

<sup>39</sup> "Trends in Telephone Service" at Table 5.3.

reported that they are engaged in the provision of operator services. Of these, an estimated 20 have 1,500 or fewer employees and three have more than 1,500 employees. Consequently, the Commission estimates that the majority of OSPs are small entities that may be affected by our action. In addition, limited preliminary census data for 2002 indicate that the total number of wired communications carriers increased approximately 34 percent from 1997 to 2002.<sup>40</sup>

15. *Prepaid Calling Card Providers.* Neither the Commission nor the SBA has developed a small business size standard specifically for prepaid calling card providers. The appropriate size standard under SBA rules is for the category Telecommunications Resellers. Under that size standard, such a business is small if it has 1,500 or fewer employees.<sup>41</sup> According to Commission data,<sup>42</sup> 89 carriers have reported that they are engaged in the provision of prepaid calling cards. Of these, 88 are estimated to have 1,500 or fewer employees and one has more than 1,500 employees. Consequently, the Commission estimates that all or the majority of prepaid calling card providers are small entities that may be affected by our action.

**b. Wireless Telecommunications Service Providers**

16. Below, for those services subject to auctions, we note that, as a general matter, the number of winning bidders that qualify as small businesses at the close of an auction does not necessarily represent the number of small businesses currently in service. Also, the Commission does not generally track subsequent business size unless, in the context of assignments or transfers, unjust enrichment issues are implicated.

17. *Wireless Service Providers.* The SBA has developed a small business size standard for wireless firms within the two broad economic census categories of "Paging"<sup>43</sup> and "Cellular and Other Wireless Telecommunications."<sup>44</sup> Under both SBA categories, a wireless business is small if it has 1,500 or fewer employees. For the census category of Paging, Census Bureau data for 1997 show that there were 1,320 firms in this category, total, that operated for the entire year.<sup>45</sup> Of this total, 1,303 firms had employment of 999 or fewer employees, and an additional 17 firms had employment of 1,000 employees or more.<sup>46</sup> Thus, under this category and associated small business size standard, the majority of firms can be considered small. For the census category Cellular and Other Wireless Telecommunications, Census Bureau data for 1997 show that there were 977 firms in this category, total, that operated for the entire year.<sup>47</sup> Of this total, 965 firms had employment of 999 or fewer employees, and an additional 12 firms

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<sup>40</sup> See *supra* note 28.

<sup>41</sup> 13 C.F.R. § 121.201, NAICS code 517310 (changed from 513330 in Oct. 2002).

<sup>42</sup> "Trends in Telephone Service" at Table 5.3.

<sup>43</sup> 13 C.F.R. § 121.201, NAICS code 513321 (changed to 517211 in October 2002).

<sup>44</sup> 13 C.F.R. § 121.201, NAICS code 513322 (changed to 517212 in October 2002).

<sup>45</sup> U.S. Census Bureau, 1997 Economic Census, Subject Series: "Information," Table 5, Employment Size of Firms Subject to Federal Income Tax: 1997, NAICS code 513321 (issued October 2000).

<sup>46</sup> *Id.* The census data do not provide a more precise estimate of the number of firms that have employment of 1,500 or fewer employees; the largest category provided is "Firms with 1000 employees or more."

<sup>47</sup> U.S. Census Bureau, 1997 Economic Census, Subject Series: "Information," Table 5, Employment Size of Firms Subject to Federal Income Tax: 1997, NAICS code 513322 (issued October 2000).

had employment of 1,000 employees or more.<sup>48</sup> Thus, under this second category and size standard, the majority of firms can, again, be considered small. In addition, limited preliminary census data for 2002 indicate that the total number of paging providers decreased approximately 51 percent from 1997 to 2002.<sup>49</sup> In addition, limited preliminary census data for 2002 indicate that the total number of cellular and other wireless telecommunications carriers increased approximately 321 percent from 1997 to 2002.<sup>50</sup>

18. *Cellular Licensees.* The SBA has developed a small business size standard for wireless firms within the broad economic census category "Cellular and Other Wireless Telecommunications."<sup>51</sup> Under this SBA category, a wireless business is small if it has 1,500 or fewer employees. For the census category Cellular and Other Wireless Telecommunications firms, Census Bureau data for 1997 show that there were 977 firms in this category, total, that operated for the entire year.<sup>52</sup> Of this total, 965 firms had employment of 999 or fewer employees, and an additional 12 firms had employment of 1,000 employees or more.<sup>53</sup> Thus, under this category and size standard, the great majority of firms can be considered small. Also, according to Commission data, 437 carriers reported that they were engaged in the provision of cellular service, Personal Communications Service (PCS), or Specialized Mobile Radio (SMR) Telephony services, which are placed together in the data.<sup>54</sup> We have estimated that 260 of these are small, under the SBA small business size standard.<sup>55</sup>

19. *Common Carrier Paging.* The SBA has developed a small business size standard for wireless firms within the broad economic census category, "Cellular and Other Wireless Telecommunications."<sup>56</sup> Under this SBA category, a wireless business is small if it has 1,500 or fewer employees. For the census category of Paging, Census Bureau data for 1997 show that there were 1,320 firms in this category, total,

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<sup>48</sup> *Id.* The census data do not provide a more precise estimate of the number of firms that have employment of 1,500 or fewer employees; the largest category provided is "Firms with 1000 employees or more."

<sup>49</sup> See U.S. Census Bureau, 2002 Economic Census, Industry Series: "Information," Table 2, Comparative Statistics for the United States (1997 NAICS Basis): 2002 and 1997, NAICS code 513321 (issued Nov. 2004). The preliminary data indicate that the total number of "establishments" decreased from 3,427 to 1,664. In this context, the number of establishments is a less helpful indicator of small business prevalence than is the number of "firms," because the latter number takes into account the concept of common ownership or control. The more helpful 2002 census data on firms, including employment and receipts numbers, will be issued in late 2005.

<sup>50</sup> See U.S. Census Bureau, 2002 Economic Census, Industry Series: "Information," Table 2; Comparative Statistics for the United States (1997 NAICS Basis): 2002 and 1997, NAICS code 513322 (issued Nov. 2004). The preliminary data indicate that the total number of "establishments" increased from 2,959 to 9,511. In this context, the number of establishments is a less helpful indicator of small business prevalence than is the number of "firms," because the latter number takes into account the concept of common ownership or control. The more helpful 2002 census data on firms, including employment and receipts numbers, will be issued in late 2005.

<sup>51</sup> 13 C.F.R. § 121.201, NAICS code 513322 (changed to 517212 in October 2002).

<sup>52</sup> U.S. Census Bureau, 1997 Economic Census, Subject Series: "Information," Table 5, Employment Size of Firms Subject to Federal Income Tax: 1997, NAICS code 513322 (issued October 2000).

<sup>53</sup> *Id.* The census data do not provide a more precise estimate of the number of firms that have employment of 1,500 or fewer employees; the largest category provided is "Firms with 1000 employees or more."

<sup>54</sup> "Trends in Telephone Service" at Table 5.3.

<sup>55</sup> *Id.*

<sup>56</sup> 13 C.F.R. § 121.201, NAICS code 513322 (changed to 517212 in October 2002).

that operated for the entire year.<sup>57</sup> Of this total, 1,303 firms had employment of 999 or fewer employees, and an additional 17 firms had employment of 1,000 employees or more.<sup>58</sup> Thus, under this category and associated small business size standard, the majority of firms can be considered small. In the Paging *Third Report and Order*, we developed a small business size standard for “small businesses” and “very small businesses” for purposes of determining their eligibility for special provisions such as bidding credits and installment payments.<sup>59</sup> A “small business” is an entity that, together with its affiliates and controlling principals, has average gross revenues not exceeding \$15 million for the preceding three years. Additionally, a “very small business” is an entity that, together with its affiliates and controlling principals, has average gross revenues that are not more than \$3 million for the preceding three years.<sup>60</sup> The SBA has approved these small business size standards.<sup>61</sup> An auction of Metropolitan Economic Area licenses commenced on February 24, 2000, and closed on March 2, 2000.<sup>62</sup> Of the 985 licenses auctioned, 440 were sold. Fifty-seven companies claiming small business status won. Also, according to Commission data, 375 carriers reported that they were engaged in the provision of paging and messaging services.<sup>63</sup> Of those, we estimate that 370 are small, under the SBA-approved small business size standard.<sup>64</sup>

20. *Wireless Communications Services.* This service can be used for fixed, mobile, radiolocation, and digital audio broadcasting satellite uses. The Commission established small business size standards for the wireless communications services (WCS) auction.<sup>65</sup> A “small business” is an entity with average gross revenues of \$40 million for each of the three preceding years, and a “very small business” is an entity with average gross revenues of \$15 million for each of the three preceding years. The SBA has approved these small business size standards.<sup>66</sup> The Commission auctioned geographic area licenses in the WCS service. In the auction, there were seven winning bidders that qualified as “very small business” entities, and one that qualified as a “small business” entity.

21. *Wireless Telephony.* Wireless telephony includes cellular, personal communications services (PCS), and specialized mobile radio (SMR) telephony carriers. As noted earlier, the SBA has developed

<sup>57</sup> U.S. Census Bureau, 1997 Economic Census, Subject Series: “Information,” Table 5, Employment Size of Firms Subject to Federal Income Tax: 1997, NAICS code 513321 (issued October 2000).

<sup>58</sup> *Id.* The census data do not provide a more precise estimate of the number of firms that have employment of 1,500 or fewer employees; the largest category provided is “Firms with 1000 employees or more.”

<sup>59</sup> *Amendment of Part 90 of the Commission's Rules to Provide for the Use of the 220-222 MHz Band by the Private Land Mobile Radio Service*, PR Docket No. 89-552, Third Report and Order and Fifth Notice of Proposed Rulemaking, 12 FCC Rcd 10943, 11068-70, paras. 291-295, 62 FR 16004 (Apr. 3, 1997).

<sup>60</sup> See Letter to Amy Zoslov, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, FCC, from A. Alvarez, Administrator, SBA (Dec. 2, 1998) (SBA Dec. 2, 1998 letter).

<sup>61</sup> *Revision of Part 22 and Part 90 of the Commission's Rules to Facilitate Future Development of Paging Systems*, Memorandum Opinion and Order on Reconsideration and Third Report and Order, 14 FCC Rcd 10030, paras. 98-107 (1999).

<sup>62</sup> *Id.* at 10085, para. 98.

<sup>63</sup> “Trends in Telephone Service” at Table 5.3.

<sup>64</sup> *Id.*

<sup>65</sup> Public Notice, “Auction of Wireless Communications Services, Auction Notes and Filing Requirements for 128 WCS Licenses Scheduled for April 15, 1997,” DA 97-386, Feb. 21, 1997.

<sup>66</sup> SBA Dec. 2, 1998 letter.

a small business size standard for "Cellular and Other Wireless Telecommunications" services.<sup>67</sup> Under that SBA small business size standard, a business is small if it has 1,500 or fewer employees.<sup>68</sup> According to Commission data, 437 carriers reported that they were engaged in the provision of wireless telephony.<sup>69</sup> We have estimated that 260 of these are small under the SBA small business size standard.

*22. Broadband Personal Communications Service.* The broadband Personal Communications Service (PCS) spectrum is divided into six frequency blocks designated A through F, and the Commission has held auctions for each block. The Commission defined "small entity" for Blocks C and F as an entity that has average gross revenues of \$40 million or less in the three previous calendar years.<sup>70</sup> For Block F, an additional classification for "very small business" was added and is defined as an entity that, together with its affiliates, has average gross revenues of not more than \$15 million for the preceding three calendar years.<sup>71</sup> These standards defining "small entity" in the context of broadband PCS auctions have been approved by the SBA.<sup>72</sup> No small businesses, within the SBA-approved small business size standards bid successfully for licenses in Blocks A and B. There were 90 winning bidders that qualified as small entities in the Block C auctions. A total of 93 small and very small business bidders won approximately 40 percent of the 1,479 licenses for Blocks D, E, and F.<sup>73</sup> On March 23, 1999, the Commission re-auctioned 347 C, D, E, and F Block licenses. There were 48 small business winning bidders. On January 26, 2001, the Commission completed the auction of 422 C and F Broadband PCS licenses in Auction No. 35. Of the 35 winning bidders in this auction, 29 qualified as "small" or "very small" businesses. Subsequent events, concerning Auction 35, including judicial and agency determinations, resulted in a total of 163 C and F Block licenses being available for grant.

## 2. Cable Operators

*23. Cable and Other Program Distribution.* This category includes cable systems operators, closed circuit television services, direct broadcast satellite services, multipoint distribution systems, satellite master antenna systems, and subscription television services. The SBA has developed small business size standard for this census category, which includes all such companies generating \$12.5 million or less in revenue annually.<sup>74</sup> According to Census Bureau data for 1997, there were a total of 1,311 firms in

<sup>67</sup> 13 C.F.R. § 121.201, NAICS code 513322 (changed to 517212 in October 2002).

<sup>68</sup> *Id.*

<sup>69</sup> "Trends in Telephone Service" at Table 5.3.

<sup>70</sup> See *Amendment of Parts 20 and 24 of the Commission's Rules – Broadband PCS Competitive Bidding and the Commercial Mobile Radio Service Spectrum Cap*, WT Docket No. 96-59, Report and Order, 11 FCC Rcd 7824, 61 FR 33859 (July 1, 1996) (*PCS Order*); see also 47 C.F.R. § 24.720(b).

<sup>71</sup> See *PCS Order*, 11 FCC Rcd 7824.

<sup>72</sup> See, e.g., *Implementation of Section 309(j) of the Communications Act – Competitive Bidding*, PP Docket No. 93-253, Fifth Report and Order, 9 FCC Rcd 5332, 59 FR 37566 (July 22, 1994).

<sup>73</sup> FCC News, *Broadband PCS, D, E and F Block Auction Closes*, No. 71744 (rel. Jan. 14, 1997); see also *Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licenses*, WT Docket No. 97-82, Second Report and Order, 12 FCC Rcd 16436, 62 FR 55348 (Oct. 24, 1997).

<sup>74</sup> 13 C.F.R. § 121.201, North American Industry Classification System (NAICS) code 513220 (changed to 517510 in October 2002).

this category, total, that had operated for the entire year.<sup>75</sup> Of this total, 1,180 firms had annual receipts of under \$10 million and an additional 52 firms had receipts of \$10 million or more but less than \$25 million. Consequently, the Commission estimates that the majority of providers in this service category are small businesses that may be affected by the rules and policies adopted herein.

24. *Cable System Operators (Rate Regulation Standard)*. The Commission has developed its own small business size standard for cable system operators, for purposes of rate regulation. Under the Commission's rules, a "small cable company" is one serving fewer than 400,000 subscribers nationwide.<sup>76</sup> The most recent estimates indicate that there were 1,439 cable operators who qualified as small cable system operators at the end of 1995.<sup>77</sup> Since then, some of those companies may have grown to serve over 400,000 subscribers, and others may have been involved in transactions that caused them to be combined with other cable operators. Consequently, the Commission estimates that there are now fewer than 1,439 small entity cable system operators that may be affected by the rules and policies adopted herein.

25. *Cable System Operators (Telecom Act Standard)*. The Communications Act of 1934, as amended, also contains a size standard for small cable system operators, which is "a cable operator that, directly or through an affiliate, serves in the aggregate fewer than 1 percent of all subscribers in the United States and is not affiliated with any entity or entities whose gross annual revenues in the aggregate exceed \$250,000,000."<sup>78</sup> The Commission has determined that there are 67,700,000 subscribers in the United States.<sup>79</sup> Therefore, an operator serving fewer than 677,000 subscribers shall be deemed a small operator, if its annual revenues, when combined with the total annual revenues of all its affiliates, do not exceed \$250 million in the aggregate.<sup>80</sup> Based on available data, the Commission estimates that the number of cable operators serving 677,000 subscribers or fewer, totals 1,450.<sup>81</sup> The Commission neither requests nor collects information on whether cable system operators are affiliated with entities whose gross annual revenues exceed \$250 million,<sup>82</sup> and therefore are unable, at this time, to estimate more accurately the number of cable system operators that would qualify as small cable operators under the size standard contained in the Communications Act of 1934.

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<sup>75</sup> U.S. Census Bureau, 1997 Economic Census, Subject Series: Information, "Establishment and Firm Size (Including Legal Form of Organization)," Table 4, NAICS code 513220 (issued October 2000).

<sup>76</sup> 47 C.F.R. § 76.901(e). The Commission developed this definition based on its determination that a small cable system operator is one with annual revenues of \$100 million or less. *Implementation of Sections of the 1992 Cable Act: Rate Regulation*, Sixth Report and Order and Eleventh Order on Reconsideration, 10 FCC Red 7393 (1995), 60 FR 10534 (Feb. 27, 1995).

<sup>77</sup> Paul Kagan Associates, Inc., *Cable TV Investor*, February 29, 1996 (based on figures for December 30, 1995).

<sup>78</sup> 47 U.S.C. § 543(m)(2).

<sup>79</sup> See *FCC Announces New Subscriber Count for the Definition of Small Cable Operator*, Public Notice DA 01-158 (Jan. 24, 2001).

<sup>80</sup> 47 C.F.R. § 76.901(f).

<sup>81</sup> See *FCC Announces New Subscriber Count for the Definition of Small Cable Operators*, Public Notice, DA 01-0158 (rel. Jan. 24, 2001).

<sup>82</sup> The Commission does receive such information on a case-by-case basis if a cable operator appeals a local franchise authority's finding that the operator does not qualify as a small cable operator pursuant to § 76.901(f) of the Commission's rules. See 47 C.F.R. § 76.909(b).



### 3. Internet Service Providers

26. *Internet Service Providers.* The SBA has developed a small business size standard for Internet Service Providers (ISPs). ISPs "provide clients access to the Internet and generally provide related services such as web hosting, web page designing, and hardware or software consulting related to Internet connectivity."<sup>83</sup> Under the SBA size standard, such a business is small if it has average annual receipts of \$21 million or less.<sup>84</sup> According to Census Bureau data for 1997, there were 2,751 firms in this category that operated for the entire year.<sup>85</sup> Of these, 2,659 firms had annual receipts of under \$10 million, and an additional 67 firms had receipts of between \$10 million and \$24,999,999. Consequently, we estimate that the majority of these firms are small entities that may be affected by our action. In addition, limited preliminary census data for 2002 indicate that the total number of Internet service providers increased approximately five percent from 1997 to 2002.<sup>86</sup>

#### D. Description of Projected Reporting, Recordkeeping and Other Compliance Requirements

27. The Order requires all facilities-based broadband Internet access providers and providers of interconnected VoIP service to be CALEA compliant. Our decision today does not impose reporting or recordkeeping requirements that would be subject to the Paperwork Reduction Act. Pursuant to CALEA both small and large carriers must design their equipment, facilities, and services to ensure that they have the required surveillance capabilities.<sup>87</sup> We note that a subsequent order will address other important issues under CALEA, such as compliance extensions and exemptions, cost recovery, identification of future services and entities subject to CALEA, and enforcement.<sup>88</sup>

#### E. Steps Taken to Minimize Significant Economic Impact on Small Entities, and Significant Alternatives Considered

28. The RFA requires an agency to describe any significant alternatives that it has considered in reaching its proposed approach, which may include (among others) the following four alternatives: (1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance or reporting requirements under the rule for small entities; (3) the use of performance, rather

<sup>83</sup> U.S. Census Bureau, "2002 NAICS Definitions: 518111 Internet Service Providers" (Feb. 2004) <[www.census.gov](http://www.census.gov)>.

<sup>84</sup> 13 C.F.R. § 121.201, NAICS code 518111 (changed from previous code 514191, "On-Line Information Services," in Oct. 2002).

<sup>85</sup> U.S. Census Bureau, 1997 Economic Census, Subject Series: Information, "Establishment and Firm Size (Including Legal Form of Organization)," Table 4, NAICS code 514191 (issued Oct. 2000).

<sup>86</sup> See U.S. Census Bureau, 2002 Economic Census, Industry Series: "Information," Table 2, Comparative Statistics for the United States (1997 NAICS Basis): 2002 and 1997, NAICS code 514191 (issued Nov. 2004). The preliminary data indicate that the total number of "establishments" increased from 4,165 to 4,394. In this context, the number of establishments is a less helpful indicator of small business prevalence than is the number of "firms," because the latter number takes into account the concept of common ownership or control. The more helpful 2002 census data on firms, including employment and receipts numbers, will be issued in late 2005.

<sup>87</sup> Section 103(a)(1)-(4) of CALEA, 47 U.S.C. § 1002(a)(1)-(4).

<sup>88</sup> See Order, *supra*, at para. 3.

than design, standards; and (4) an exemption from coverage of the rule, or any part thereof, for small entities.<sup>89</sup>

29. In the Order, we conclude that facilities-based broadband Internet access providers and providers of interconnected VoIP service are “telecommunications carriers” under CALEA’s SRP.<sup>90</sup> In arriving at these conclusions, the Commission first interprets the SRP to establish a legal framework for assessing services under CALEA, explaining the basis for all statutory interpretations that inform this framework.<sup>91</sup> We then apply this framework to providers of facilities-based broadband Internet access services and interconnected VoIP services.<sup>92</sup> The Commission considered various alternatives, which it rejected or accepted for the reasons set forth in the body of the Order. The significant alternatives that commenters discussed and that we considered in determining that these providers are “telecommunications carriers” under CALEA’s SRP are as follows.

30. *Legal Framework.* In the Order, we affirm our tentative conclusion that Congress intended the scope of CALEA’s definition of telecommunications carrier to be more inclusive than the similar definition of “telecommunications carrier” in the Communications Act.<sup>93</sup> In reaching this conclusion, we rejected arguments that the definition of “telecommunications carriers” in CALEA is functionally identical to the definition of that term in the Communications Act.<sup>94</sup> While we recognize that a broader interpretation may include small entities under the definition, CALEA contains several differences that support this broader interpretation of the term “telecommunications carrier” under CALEA. As noted above, the most significant difference is the SRP, which “has no analogue” in the Communications Act.<sup>95</sup>

31. The SRP applies only to entities “engaged in providing wire or electronic communication switching or transmission service.”<sup>96</sup> We conclude that the term “switching” in this phrase includes “routers, softswitches, and other equipment that may provide addressing and intelligence functions for packet-based communications to manage and direct the communications along to their intended destinations.”<sup>97</sup> We considered but rejected arguments that the term “switching” as used by Congress in 1994 did not contemplate routers and softswitches.<sup>98</sup> For instance, some commenters argued that this term must forever be limited to that function as it was commonly understood in 1994, namely circuit switching in the narrowband PSTN.<sup>99</sup> We believe that interpreting CALEA’s inclusion of the word

<sup>89</sup> 5 U.S.C. § 603(c).

<sup>90</sup> Under CALEA’s SRP, a telecommunications carrier is “a person or entity engaged in providing wire or electronic communication switching or transmission service to the extent that the Commission finds that such service is a replacement for a substantial portion of the local telephone exchange service and that it is in the public interest to deem such a person or entity to be a telecommunications carrier for purposes of CALEA.” 47 U.S.C. § 1001(8)(B)(ii).

<sup>91</sup> See Order, *supra*, Section III.A.

<sup>92</sup> See Order, *supra*, Sections III.B, III.C.

<sup>93</sup> See Order, *supra*, at para. 10.

<sup>94</sup> See Order, *supra*, at n.20.

<sup>95</sup> See Order, *supra*, at para. 10 & n.19.

<sup>96</sup> 47 U.S.C. § 1001(8)(B)(ii).

<sup>97</sup> See Order, *supra*, at para. 11.

<sup>98</sup> See *id.*

<sup>99</sup> See I&P Comments at 32-34; I&P Reply at 24.

“switching” to describe a function that Congress intended to be covered – regardless of the specific technology employed to perform that function – is the interpretation most consistent with the purpose of the statute.<sup>100</sup> The alternative approach would effectively eliminate any ability the Commission may have to extend CALEA obligations under the SRP to service providers using advanced digital technologies, in direct contravention of CALEA’s stated purpose.<sup>101</sup>

32. The SRP requires that the service provided be “a replacement for a substantial portion of the local telephone exchange service.”<sup>102</sup> We affirmed our tentative conclusion that this requirement is satisfied if a service replaces any significant part of an individual subscriber’s functionality previously provided via circuit-switched local telephone exchange service.<sup>103</sup> We considered various interpretations. For example, we considered, but declined to adopt, an interpretation that would require the service to be capable of replacing *all* of the functionalities of local exchange service.<sup>104</sup> Instead, we agree with DOJ that the language “substantial portion of the local telephone exchange service” includes both the POTS service and the transmission conduit functionality provided by local telephone exchange service in 1994.<sup>105</sup> While our interpretation will most likely cover small entities, commenters have not persuaded us to adopt a different interpretation.

33. The SRP also requires that the Commission find that “it is in the public interest to deem . . . a person or entity to be a telecommunications carrier for purposes of [CALEA].”<sup>106</sup> We conclude that the Commission will consider three factors in its public interest analysis: (1) promotion of competition; (2) encouragement of the development of new technologies; and (3) protection of public safety and national security.<sup>107</sup> We declined to identify any other specific public interest considerations, which we recognize might benefit small telecommunications carriers.<sup>108</sup>

34. We conclude, as we indicated in the *Notice*, that the terms “telecommunications carrier” and “information services” in CALEA cannot be interpreted identically to the way those terms have been interpreted under the Communications Act in light of Congress’s intent and purpose in enacting CALEA.<sup>109</sup> As explained above, we disagree with commenters who argue that we should interpret the statute to narrow the scope of services that are covered today to a more narrow group of services than those covered when CALEA was enacted, particularly in light of CALEA’s stated purpose to “preserve the government’s ability to . . . intercept communications that use advanced technologies such as digital or wireless transmission.”<sup>110</sup> While we recognize that small entities might benefit by an interpretation that would narrow the scope of services subject to CALEA, we believe that decisions about the

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<sup>100</sup> See Order, *supra*, at para. 11.

<sup>101</sup> See *id.*

<sup>102</sup> 47 U.S.C. § 1001(8)(B)(ii).

<sup>103</sup> See Order, *supra*, at para. 12.

<sup>104</sup> See *id.*

<sup>105</sup> See Order, *supra*, at para. 13.

<sup>106</sup> 47 U.S.C. § 1001(8)(B)(ii).

<sup>107</sup> House Report, 1994 U.S.C.C.A.N at 3501.

<sup>108</sup> See Order, *supra*, at para. 14 & n.46.

<sup>109</sup> Notice, 19 FCC Rcd at 15697-15706, paras. 41-50.

<sup>110</sup> See Order, *supra*, at paras. 11, 15-23.

applicability of CALEA must be based on CALEA's definitions alone, not on the definitions in the Communications Act.<sup>111</sup>

35. *Facilities-Based Broadband Internet Access Service Providers.* We apply our conclusions concerning the legal framework to providers of facilities-based broadband Internet access services and find that these providers are subject to CALEA under the SRP.<sup>112</sup> In reaching this decision, we considered the comments by small carriers, which generally claimed that the public interest would not be served by subjecting these providers to CALEA under the SRP.<sup>113</sup> Based on our analysis here, we decline to exclude any facilities-based broadband Internet access providers from CALEA requirements at this time. We agree with DOJ that these commenters have not provided sufficient evidence, identified the particular carriers that should be exempted from CALEA's SRP, or addressed law enforcement's needs.<sup>114</sup> These telecommunications carriers have several options under CALEA.<sup>115</sup> We believe that these CALEA provisions will safeguard small entities from any significant adverse economic impacts of CALEA compliance.

36. Additionally, based on comments from these small carriers, we adopt a *Further Notice* which seeks comment on what procedures the Commission should adopt to implement CALEA's exemption provision, as well as the appropriateness of requiring something less than full CALEA compliance for certain classes or categories of providers, such as small or rural entities.<sup>116</sup> We also seek comment on the best way to impose different compliance standards. We believe that the *Further Notice* will assist the Commission in adopting streamlined exemption procedures, which will ultimately benefit both large and small entities alike. The *Further Notice* is also a concerted effort by the Commission to adopt any other rules that will reduce CALEA burdens on small entities.<sup>117</sup> We believe our approach represents a reasonable accommodation for small carriers, and we encourage these entities to file comments on the *Further Notice* to assist the Commission in these efforts.

37. *Interconnected VoIP Service.* We apply our conclusions concerning the legal framework to providers of interconnected VoIP services and find that these providers are subject to CALEA under the SRP.<sup>118</sup> We considered but abandoned the distinction the *Notice* drew between "managed" and "non-

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<sup>111</sup> See Order, *supra*, at para. 23.

<sup>112</sup> See Order, *supra*, Section III.B.

<sup>113</sup> See Order, *supra*, at n.98. A number of commenters claim that small entities providing broadband Internet access service or entities that provide broadband Internet access service in rural areas do not meet the SRP's public interest standard. See, e.g. NTCA Comments at 3-5 (stating that "a proper public interest analysis should exempt small businesses providing broadband access"); RTG Comments at 2-3 (arguing that rural carriers must be excluded from the SRP because "such an exclusion is in the public interest"); UPLS Reply at 10 (stating that applying CALEA to BPL services "would not serve the public interest, certainly not without more time to comply).

<sup>114</sup> See DOJ Reply at 21-22 (stating that it will not "support a broad exemption for any class of carriers under the public-interest clause of the SRP . . . or any other provision in the absence of a clear definition of the scope of carriers that would be covered or without clearly identified and sufficient means of addressing the needs of law enforcement and protecting privacy").

<sup>115</sup> See Order, *supra*, at n.98.

<sup>116</sup> See Order, *supra*, Part IV.

<sup>117</sup> Small entities, for example, may also file a petition under section 109(b) and argue that CALEA compliance is not reasonably achievable for a variety of reasons, including a carrier's financial resources.

<sup>118</sup> See Order, *supra*, Section III.C.

managed” VoIP services as the dividing line between VoIP services that are covered by CALEA and those that are not.<sup>119</sup> The record convinced us that this distinction is unadministrable; even DOJ expressed an openness to a different way of identifying those VoIP services that CALEA covers.<sup>120</sup> We believe that the alternative approach, using “interconnected VoIP services” to define the category of VoIP services that are covered by CALEA, provides a clearer, more easily identifiable distinction that is consistent with recent Commission orders addressing the appropriate regulatory treatment of IP-enabled services.

38. As a result, certain VoIP service providers are not subject to CALEA obligations imposed in today’s Order. Specifically, today’s Order does not apply to those entities not fully interconnected with the PSTN. Because interconnecting with the PSTN can impose substantial costs, we anticipate that many of the entities that elect not to interconnect with the PSTN, and which therefore are not subject to the rules adopted in today’s Order, are small entities. Small entities that provide VoIP services therefore also have some control over whether they will have to be CALEA compliant. Small businesses may still offer VoIP service without being subject to the rules adopted in today’s Order by electing not to provide an *interconnected* VoIP service.

39. *Scope of Order.* Our action in today’s Order is limited to establishing that CALEA applies to facilities-based broadband Internet access providers and interconnected VoIP service providers. As noted above, we will address in a subsequent order other important outstanding issues under CALEA, such as compliance extensions and exemptions, cost recovery, identification of future services and entities subject to CALEA, and enforcement.<sup>121</sup> The Order establishes a deadline of 18 months from the effective date of the Order, by which time newly covered entities and providers of newly covered services must be in full compliance with CALEA. We considered various comments advocating, for example, effective dates ranging from 12 months to 24 months.<sup>122</sup> We also considered whether the Commission should grant additional time for small carriers to become CALEA compliant.<sup>123</sup> However, as explained above, we find that 18 months is a reasonable time period to expect all providers of facilities-based broadband Internet access service and interconnected VoIP service to comply with CALEA. This alternative represents a reasonable accommodation for small entities and others, as these newly covered entities can begin planning to incorporate CALEA compliance into their operations. Furthermore, this approach will ensure that the appropriate parties become involved in ongoing discussions among the Commission, law enforcement, and industry representatives to develop standards for CALEA capabilities and compliance.<sup>124</sup>

## F. Report to Congress

40. The Commission will send a copy of the Order, including this Certification, in a report to be sent to Congress and the Government Accountability Office pursuant to the Congressional Review Act.<sup>125</sup> In addition, the Commission will send a copy of the Order, including this Certification, to the Chief Counsel

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<sup>119</sup> See Order, *supra*, at para. 40.

<sup>120</sup> See *id.*

<sup>121</sup> See Order, *supra*, at para. 46.

<sup>122</sup> See *id.* & n.138.

<sup>123</sup> See *id.*

<sup>124</sup> See Order, *supra*, at para. 47.

<sup>125</sup> See 5 U.S.C. § 801(a)(1)(A).

for Advocacy of the SBA. A copy of the Order and Certification (or summaries thereof) will also be published in the Federal Register.<sup>126</sup>

## II. INITIAL REGULATORY FLEXIBILITY ANALYSIS

41. As required by the Regulatory Flexibility Act of 1980, as amended (RFA),<sup>127</sup> the Commission has prepared the present Initial Regulatory Flexibility Analysis (IRFA) of the possible significant economic impact on small entities that might result from today's *Further Notice*. Written public comments are requested on this IRFA. Comments must be identified as responses to the IRFA and must be filed by the deadlines for comments on the *Further Notice* provided above. The Commission will send a copy of the *Further Notice*, including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration.<sup>128</sup> In addition, the *Further Notice* and IRFA (or summaries thereof) will be published in the Federal Register.<sup>129</sup>

### A. Need for, and Objectives of, the Proposed Rules

42. In the *Further Notice*, we seek comment on two aspects of the conclusions we reach in today's Order. First, with respect to interconnected VoIP, we seek comment on whether we should extend CALEA obligations to providers of other types of VoIP services. Specifically, we ask whether there any types of "managed" VoIP service that are not covered by today's Order, but that should be subject to CALEA.<sup>130</sup> Second, some commenters in this proceeding have argued that certain classes or categories of facilities-based broadband Internet access providers – notably small and rural providers and providers of broadband networks for educational and research institutions – should be exempt from CALEA.<sup>131</sup> We reach no conclusions in today's Order about the merits of these arguments, as we believe that additional information is necessary before reaching a decision. However, the Commission seeks comment on what procedures, if any, the Commission should adopt to implement CALEA's exemption provision.<sup>132</sup> In addition, the Commission seeks comment on the appropriateness of requiring something less than full CALEA compliance for certain classes or categories of providers, as well as the best way to impose different compliance standards.<sup>133</sup> Our objective is to adopt streamlined exemption procedures, which will ultimately benefit both large and small entities alike and is also a concerted effort by the

<sup>126</sup> See 5 U.S.C. § 604(b).

<sup>127</sup> See 5 U.S.C. § 603. The RFA, see 5 U.S.C. §§ 601-12, has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), Pub. L. No. 104-121, 110 Stat. 857 (1996).

<sup>128</sup> See 5 U.S.C. § 603(a).

<sup>129</sup> See 5 U.S.C. § 603(a).

<sup>130</sup> See *Further Notice*, *supra*, at para. 48.

<sup>131</sup> See *id.* at para. 49; see also Smithville Comments at 1-2 (arguing that small broadband access providers in rural areas should be exempted from CALEA under 1001(8)(C)(ii)); EDUCAUSE Comments at 22-28 (arguing that private broadband networks used by schools, libraries, and research institutions should be exempt from CALEA requirements). DOJ has recognized that exemptions may be appropriate for certain entities and has indicated a willingness to evaluate such requests. DOJ Reply at 20 ("If a party to this proceeding can articulate a well-defined category of institutions, services and/or measures taken to protect the public safety and national security concerns of law enforcement that would merit exception from CALEA's requirements, DOJ would be willing to evaluate such a proposal.").

<sup>132</sup> See *Further Notice*, *supra*, at para. 50.

<sup>133</sup> See *id.* para. 52.

Commission to adopt any other rules that will reduce CALEA burdens on small entities or other categories of telecommunications carriers.

## **B. Legal Basis**

43. The legal basis for any action that may be taken pursuant to the *Further Notice* is contained in sections 1, 4(i), 7(a), 229, 301, 303, 332, and 410 of the Communications Act of 1934, as amended, and section 102 of the Communications Assistance for Law Enforcement Act, 18 U.S.C. § 1001.

## **C. Description and Estimate of the Number of Small Entities to Which the Proposed Rules May Apply**

44. The RFA directs agencies to provide a description of and, where feasible, an estimate of the number of small entities that may be affected by the proposed rules.<sup>134</sup> The RFA generally defines the term “small entity” as having the same meaning as the terms “small business,” “small organization,” and “small governmental jurisdiction.”<sup>135</sup> In addition, the term “small business” has the same meaning as the term “small business concern” under the Small Business Act.<sup>136</sup> A small business concern is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration (SBA).<sup>137</sup> This present *Further Notice* might, in theory, reach a variety of industries; out of an abundance of caution, we have attempted to cast a wide net in describing categories of potentially affected small entities. We would appreciate any comment on the extent to which the various entities might be directly affected by our action.

45. We have described and estimated the number of small entities to which the proposed rules might apply in the Final Regulatory Flexibility Certification, *supra*, and hereby incorporate by reference those descriptions here.

## **D. Description of Projected Reporting, Recordkeeping and Other Compliance Requirements**

46. In the *Further Notice*, we seek comment on whether we should extend CALEA obligations to providers of other types of VoIP services. We also seek comment on what procedures, if any, the Commission should adopt to implement CALEA’s exemption provision.<sup>138</sup> In addition, we seek comment on the appropriateness of requiring something less than full CALEA compliance for certain classes or categories of providers, as well as the best way to impose different compliance standards. These proposals do not impose reporting or recordkeeping requirements that would be subject to the Paperwork Reduction Act. Therefore, we have not attempted here to provide an estimate in terms of burden hours.

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<sup>134</sup> 5 U.S.C. §§ 603(b)(3), 604(a)(3).

<sup>135</sup> 5 U.S.C. § 601(6).

<sup>136</sup> 5 U.S.C. § 601(3) (incorporating by reference the definition of “small business concern” in the Small Business Act, 15 U.S.C. § 632). Pursuant to 5 U.S.C. § 601(3), the statutory definition of a small business applies “unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such terms which are appropriate to the activities of the agency and publishes such definitions(s) in the Federal Register.”

<sup>137</sup> 15 U.S.C. § 632.

<sup>138</sup> 47 U.S.C. § 1001(8)(C)(ii).

Rather, we are asking commenters to provide the Commission with reliable information and comments on any costs and burdens on small entities.

**E. Steps Taken to Minimize Significant Economic Impact on Small Entities, and Significant Alternatives Considered**

47. The RFA requires an agency to describe any significant alternatives that it has considered in reaching its proposed approach, which may include (among others) the following four alternatives: (1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance or reporting requirements under the rule for small entities; (3) the use of performance, rather than design, standards; and (4) an exemption from coverage of the rule, or any part thereof, for small entities.<sup>139</sup>

48. In the *Further Notice*, with respect to interconnected VoIP, we seek comment on whether we should extend CALEA obligations to providers of other types of VoIP services. Specifically, we invite comment as to whether there are any types of “managed” VoIP service that are not covered by today’s Order, but that should be subject to CALEA.<sup>140</sup> For purposes of this IRFA, we specifically seek comment from small entities on these issues, in particular, on the extent to which any “managed” VoIP service that the Commission may find subject to CALEA could impact them economically.

49. In the *Further Notice*, the Commission also considers and asks questions about two alternative approaches to requiring full CALEA compliance to address the impact of CALEA applicability on small entities. First, it addresses an exemption process. Next, it addresses the possibility of requiring something less than full CALEA compliance for small entities. Finally, it asks commenters to propose any other alternatives that have not been considered or identified.

50. The *Further Notice* seeks comment on what procedures, if any, the Commission should adopt to implement CALEA’s exemption provision.<sup>141</sup> Section 102(8)(C)(ii) excludes from CALEA’s definition of telecommunications carrier “any class or category of telecommunications carriers that the Commission exempts by rule after consultation with the Attorney General.” In addition, we seek comment on the appropriateness of requiring something less than full CALEA compliance for certain classes or categories of providers, as well as the best way to impose different compliance standards. Our goal is to adopt streamlined exemption procedures or any other rules that will ultimately assist the Commission in reducing burdens on small entities or other categories of telecommunications carriers.

51. With respect to the exemption provision, the Commission has never exempted telecommunications carriers under this provision, nor has it adopted specific procedures for doing so. We seek comment on what procedures, if any, the Commission should adopt for exempting entities under section 102(8)(C)(ii). In the *Further Notice*, the Commission evaluates how to properly interpret the provision. We seek comment, for example, on how the phrase “by rule” should be interpreted,<sup>142</sup> as we recognize that the Commission’s interpretation of this phrase could create burdens for small entities.

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<sup>139</sup> 5 U.S.C. § 603(c).

<sup>140</sup> See *Further Notice*, *supra*, Part IV.

<sup>141</sup> See *id.*

<sup>142</sup> See *id.*